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## CONSERVATION EASEMENTS: BOON TO THE ENVIRONMENT OR POTENTIALSOURCE OF LITIGATION?

by

Dr. Sharlene A. McEvoy\*

### INTRODUCTION

Many people are not aware that there is a land use device that preserves environmentally valuable land and offers tax benefits to the donor of land both during and after life. This device is called a conservation easement or conservation restriction. There are many advantages and disadvantages to these easements and this paper will discuss its benefits and drawbacks for property owners.

A conservation easement is a legally-enforceable document that is recorded on the land records and restricts or removes the right to develop all or a portion of a piece of property.<sup>1</sup> The document creating easement can provide not only for the removal of the right to build on, dump on, pave or mine the property but require that it be used for certain purposes.

The definition of a conservation easement is:

A non possessory interest of a holder in real property imposing limitations or affirmative obligations for the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring the availability for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving historical architectural aspects of real property.<sup>2</sup>

Creating a conservation easement involves the creation of a contract between a landowner and a conservation organization restricting the kind of development permitted. While the purpose is to preserve some natural feature of the land, the effect is to limit ownership rights.

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Once the contract has been properly drawn, signed and recorded, the conservation easement (or restriction) in favor of an organization or public agency is binding on present and future owners of the property with regard to the restrictions.<sup>3</sup> Under the easement, a landowner retains all rights in the property but the land must be used in a way consistent with the restrictions. The easement can also be drafted to protect only certain sections of the property.

In addition, the easement can be written to last forever or for a specified period of time. The landowner is also required to allow the grantee-organization or agency to go on the property regularly to determine that the restrictions are not being violated.<sup>4</sup> The grantee may require the owner to correct any violations and restore the property to its condition prior to the infraction.<sup>5</sup>

Conservation easements differ from another land use device called a restrictive covenant which is also a means to control the use of property. In the latter, the right to develop a property in a certain way is restricted without the involvement of a third party such as a government entity or land trust organization. All that the landowner needs to do is to execute a deed to the property which includes the covenants.

Under a restrictive covenant, development rights are not being donated to a charitable organization, there are no tax advantages, nor is there a "watchdog" to make sure that the restrictions are honored. Enforcement of restrictive covenants is by a private lawsuit between similarly-situated parties.<sup>6</sup> Restrictive covenants do not guarantee that land will remain undeveloped.<sup>7</sup>

If a conservation easement is placed on the property, the land cannot be developed and the local government must tax the property to reflect this fact.

There are drawbacks to using a conservation easement. First, to achieve a tax reduction, the land must be permanently placed under the easement. Second, an additional requirement of a conservation easement is that the landowner grant it to a qualified organization. Among the qualified groups for tax purposes are local governments or non-profit organizations. According to the nomenclature of the easement, the "grantee" of the restriction agrees to "hold" and enforce the easement.<sup>8</sup>

## ENFORCEMENT

How is a conservation easement enforced? The grantee-government or organization is required to monitor the restricted property to assure that the provisions of the conservation easement are obeyed. Monitoring "normally involves a periodic walk by a person from the organization or agency through the property and a subsequent written report listing the current uses."<sup>9</sup>

When the easement is created, photographs of the site should be taken to document the condition of the property. This careful documentation of the property assures that the landowner will comply with the terms of the easement. The purpose of such a survey is to determine what is on and not on the property at the time the grant is made. This protects the grantor-landowner from a subsequent claim that there has been a change on the property that compromises the income tax deduction and property tax assessment.<sup>10</sup>

The initial inspection however should not be the last because the land trust or government grantee of the easement has the obligation to inspect the property to determine compliance with the provisions of the easements. The grantee is responsible to monitor the land annually by walking the property and preparing a written report noting any changes in the use of the property from the previous visit. The walk should also be verified by photographs noting the date of the visit.

If no changes have occurred such fact should be noted. If there have been changes such as a road, a building or other evidence of non-compliance, a copy of the report should be sent to the landowner to verify the condition of the property.<sup>11</sup>

Can the grantee be held liable for failure to enforce the easement? While case law is unclear, there are incentives for the grantee to enforce the easement. Any land trust group that has been granted tax exempt status by the IRS risks losing that status if it does not operate in a manner consistent with the stated charitable purposes of the organization.<sup>12</sup> If a local government is the grantee, it would not be subject to this proscription.

Second, organizations who undertake monitoring activities are or should be proponents of the environment and should take their watchdog obligations seriously. Therefore grantees who undertake the enforcement of such easements should be drawn from directories maintained by the state Departments of Environmental Protection.<sup>13</sup>

## TAX CONSEQUENCES

An important advantage of the conservation easement to a landowner is the tax consequences. The conservation easement provides for the reduction of property taxes and estate taxes for landowners and their heirs.

The 1997 Taxpayer Relief Act<sup>14</sup> provided the impetus for the creation of the conservation easement. This law which became effective on January 1, 1998 relieves the pressure on heirs to sell land to developers to pay estate taxes.<sup>15</sup> It comes at a time when the generation which came of age during the Depression and World War II, and accumulated much wealth in the form of real property, is passing away and leaving the property to its "Baby Boomer" children. The latter need to mitigate the tax implications of the passing of the property as well as to satisfy a desire to reserve some land in its natural state.

The key provisions of the 1997 Act are:

- It cuts estate taxes up to 40% on land that is left undeveloped under a conservation easement.
- It gives heirs nine months after the death of the property owner to create a conservation easement.
- Land eligible for the easement must be within 25 miles of a national park, metropolitan area or wilderness area, or within 10 miles of an urban national forest.
- The exclusion is subject to a cap of \$100,000 in 1997 but increases incrementally to \$500,000 by 2002.

- Permits tax-deductible conservation easements on the land if mineral or surface rights are separately owned as long as the possibility of extraction is low which may encourage land conservation in the Western states.<sup>16</sup>

While there is no minimum amount of acreage required to create an easement, IRS regulations mandate that an easement protect land that “provides a significant public benefit.” Property with “significant public benefit” includes historic sites, animal or plant habitat, or land dedicated to preserving natural resources.

## CHANGING THE CONSERVATION EASEMENT

As with any document involving real property, careful attention should be given to the drafting of a conservation easement. Under the Statute of Frauds, any grant of land must be in writing in order to be enforced in court. Because it is a deed, it must be recorded on the land records just as any other transfer of an interest in land.

Amending the contents of the conservation easement may be difficult since both the grantor and grantee must agree to any changes. There is the additional consideration of the role of the owners of the land if the grantor of the easement no longer owns it. The IRS would closely examine any change in an easement on which a tax deduction was based. The only changes that would likely be acceptable to the grantor, the grantee and the IRS would be those that would make the easement stricter by providing more protections for the restricted land. Any amendment to the easement that provides more protection for the land could result in more tax savings.

Can the easement be changed to lessen the restrictions? A change in the easement cannot be done unilaterally by the grantee-organization because the latter must abide by its terms. There are however circumstances in which an easement can be changed, and that can occur when the issue is litigated, and a court determines that due to a change in circumstances related to neighboring properties the easement no longer applies.<sup>17</sup>

## DISADVANTAGES

While the conservation easement device has a positive impact on the environment and favorable tax implications, there are some drawbacks. First, placing a conservation easement on a property reduces its value because the use of the land is limited. In addition, a lender that has made a loan secured by a mortgage on the property will have to agree “to subordinate its lien to the easement.”<sup>18</sup> Therefore, there must be a mortgage subordination agreement which gives the easement priority over the mortgage. The IRS is a factor because it will not approve an easement that is subject to a mortgage.<sup>19</sup>

There is a second negative feature. To obtain tax benefits there may have to be public access -- physical or visual -- to the easement. Public access is an issue because the “conservation purposes” test must be satisfied.<sup>20</sup>

The “conservation purposes” test can be satisfied in one of four ways. The property preserved:

1. Will provide public recreation or educational opportunities.
2. Contains a valuable plant or animal habitat.
3. Will result in the preservation of significant open space in an area where the public can enjoy it or where a published government policy of some kind has mandated that property in a particular geographical area should be preserved.
4. Will result in the preservation of some historically significant buildings or property.<sup>21</sup>

Under the first and second tests listed above and for the first part of the third, physical access must be granted.

In addition to benefits of the federal Taxpayer Relief Act, there are potential local property tax abatements. Since many municipalities assess property taxes according to the “best and highest use of the property” property may be assessed at a higher value as a potential building lot rather than as forest land.<sup>22</sup>

The grantee-organization or agency benefits from the conservation easement because it protects land without the groups’ having to purchase it. The desire of towns and municipalities for open space can be achieved by the easement device without a locality having to spend taxpayer dollars and suffer the expense of maintaining the land. A city or town’s cost is confined to the cost of inspection. A conservation easement allows property to remain in private hands subject to property taxes,<sup>23</sup> which also benefits local governments.

The trend toward creating easements has also been encouraged by the fact that many state legislatures have passed the Uniform Conservation Easement Act<sup>24</sup> (UCEA). There are a few states that have not yet passed this law so common law principles of contract law and easement law must be relied upon in deciding issues that may arise in court.<sup>25</sup>

## LITIGATION AND THE CONSERVATION EASEMENT

While there have been few cases in which the issue of conservation easements have been litigated, the case that is cited as establishing the validity of the device is Parkinson v. Board of Assessors of Medfield.<sup>26</sup>

The facts of the case were that a property owner created a conservation easement with the Medfield Trustees of Reservations as the grantee. The goal of the easement was to prohibit the building of more structures on the land and to prevent any use of the property which was inconsistent with its preservation in a natural state. The easement however did permit the construction of a single family residence. A dispute arose over the property tax assessment which denied a discount to the owner. The assessors argued that the easement was invalid because it applied to buildings as well as land.<sup>27</sup>

The Supreme Judicial Court of Massachusetts held the easement invalid but not because it included buildings and land, but because the terms of the easement were so vague that "It preclude(d) any meaningful identification of the servient estate."<sup>28</sup> There the upshot of Parkinson is that the drafters must take care to be specific as to the size and location of the land subject to the easement.<sup>29</sup>

The drafter should take care to write the easement in such a way as to adequately describe the property, to indicate how it will be protected, and to delineate the responsibilities of grantee and property owner.<sup>30</sup>

There are other concerns which relate to monitoring and enforcing the easement. Both are vital to the continuation of the easement as originally granted.

The easement must be guarded against violations forever and this can be a financial burden on the grantee organizations and agencies. The groups that accept easements must actively monitor them and be prepared to go to court to enforce them to prevent violations if necessary.

In addition to regular and systematic monitoring, there must be education of future owners of the land as to what the easement means. This can be done by advising the real estate community so that it can alert the buyers of the land about the existence of, and responsibility for, observing easement provisions prior to the purchase. Real estate brokers, agents and lawyers have an obligation to advise a potential buyer of the land restrictions and to ask if he or she can live with the fact that the land cannot be used as fully as property which is not so encumbered.

If an easement violation occurs, then enforcement must follow. If persuasion in the form of a letter from the grantee fails to gain compliance, there must be litigation which can be expensive especially if the grantee of the easement is conservation organization which relies on donations for sustenance. Litigation can also be a burden to municipalities who are faced with expensive legal fees to enforce the easement. There is sure to be litigation as land changes hands and second generation owners acquire property subject to easements.

Who would begin such a lawsuit? The grantee or holder of the easement would certainly have standing to bring an enforcement action. The U.C.E.A. states that a land owner whose real property is burdened by the easement would also have standing to bring such an action.<sup>31</sup>

In a recent Connecticut case, a conservation easement was the subject of an enforcement action after a "second generation landowner" refused to comply with a ruling by the Town's Planning Commission regarding the erection of a fence and subsequent letters to the violator by the Town's Zoning Enforcement Officer went unheeded. The Town brought an enforcement action nearly two years after the violation was first reported.<sup>32</sup>

The easement called "conservation restriction" was placed on land that formed the border of three lots on a subdivision called Sunrise Estates in Woodbury. The granting of the easement to the Town protected a wetland area, a habitat containing peepers or tree frogs and spotted turtles which are a threatened species. The easement provided that the land was to be kept in a "wild, natural, and open" condition which was interpreted by the Planning Commission to mean that no fences could be placed in the protected area. Two of the property owners had placed fences in the easement zone and allowed the grazing of sheep and horses which threatened the degradation of the protected area with animal waste and the destruction of the habitat.

While one property owner acquiesced and removed his fence, the other owners, Joseph and Catherine Sajda insisted on retaining theirs. The portion of a 3.3 acre parcel of land owned by the Sajdas that was limited under the easement was a 60 foot wide area on the westernmost border.<sup>33</sup> The conservation easement was granted by the Sajdas' predecessor in the title who had subdivided the property into six lots. The conservation easement was granted on June 11, 1993 and recorded on the Town's land records on October 8, 1993. In October, 1996, the Sajdas obtained some sheep and placed a fence in the protected area. Thus within three years of its creation, the easement was violated.

The Town of Woodbury sought temporary and permanent injunctions to prevent the Sajdas from continuing this activity, and sought its attorney's fees<sup>34</sup> and costs.

Under section 22a-19 of the Connecticut General Statutes, a neighbor whose land was also subject to the easement intervened in the zoning enforcement action "to enforce the terms and conditions of a conservation restriction easement. . . encumbering the subject property that requires an undisturbed vegetative buffer for the purpose of maintaining the area of the conservation restriction easement in its natural, scenic, and open condition."<sup>35</sup>

The litigation to enforce the easement cost the Town and intervenor several thousand dollars, an indication of how expensive it can be to enforce an easement against a defiant property owner.

## THE VALUE OF A CONSERVATION EASEMENT

The value of a conservation easement is an important issue because of its effect on the market value of the property. Once the easement is effective, the portion of the land subject to the easement is limited to the specific uses.



Because easements are perpetual, there can be no changes in the use of the land and subsequent land owners may chafe at the restrictions, because it limits what they can do.

Can an easement then be terminated? Usually a conservation easement is designed to be perpetual. But some extraordinary circumstances will end it. Eminent domain occurs when the government takes land for public use, so such a taking would terminate the easement. So too would an easement end if the property were sold in a foreclosure sale which means the purchaser takes title to the property free of encumbrances.<sup>36</sup>

Perhaps the most common way for an easement to end, and this will become clear as more easements are created, are changed circumstances or non-enforcement. If the situation were such that the land was being used for a purpose other than that contemplated by the original grant due to changed conditions, the easement would end. There might also be a situation in which there have been numerous violations of the easement by second and third generation owners of the property or the grantee organization has become defunct or has been lax in enforcement. If there is non-enforcement for a period of years and the grantee then decided to enforce the easement, the landowner would have grounds to object to the renewed enforcement.<sup>37</sup>

## CONCLUSION

Conservation easements have been touted as a valuable device for protecting the environment and preserving natural resources. They are seen as a panacea to preserving land especially in an era when suburban sprawl and overbuilding threatens the land and habitats. Certainly the move for environmental protection and federal and local tax incentives are a potent incentive for their creation.

But there is a downside. Conservation easements can stymie future economic development, depress the value of land, and lower tax revenues for local governments which rely heavily on them to support education, recreation and other local services. Moreover, zoning regulations are a more appropriate device for controlling land use because there is an opportunity for public input. With a conservation restriction, a single landowner can dictate the use of land without community participation or public hearings.

For example, actor/director Robert Redford dedicated 860 acres near his Sundance, Utah resort as a nature and wildlife preserve. The Redford family donated a permanent conservation easement to a private group, the Utah Open Lands Conservation Association, so the land can never be developed. Undoubtedly Redford, a dedicated environmentalist, has the goal of protecting a scenic habitat and watershed but there is also a private gain under the IRS regulation. Perhaps Redford's land might have had its highest and best use as a park that could be enjoyed by the public or used for economic development.<sup>38</sup>

Since these easements have only been used for a short period, there is little case law to indicate how they will be enforced. As the Connecticut case discussed in this paper indicates, the process of enforcement can be a lengthy and expensive one, especially if one is dealing with a recalcitrant enforcement agency and obdurate land owners. More time will have to pass before the true efficacy of the conservation easement as an effective protector of the land can be conclusively determined.

Yet creation of such easements does have a desirable purpose as society becomes increasingly concerned about the degradation of the environment, open space and habitats. Since most desirable ecosystems are in the hands of private parties, there is a need to protect habitats which, once lost, can never be reclaimed.<sup>39</sup>

#### ENDNOTES

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<sup>1</sup> Ray Lyons, "Conservation Easement: A Primer," Timberline, New England Forestry Foundation, Spring, 1996 at 16. (hereinafter "Conservation Easements: A Primer").

<sup>2</sup> Melissa Waller Baldwin "Conservation Easements: A Viable Tool for Land Preservation," Land and Water Law Review, Vol. XXXII 1997 at 105 quoting UNIF. Conservation Easement Act 1 (1) (Supp. 1995) (hereinafter Conservation Easements: A Viable Tool).

<sup>3</sup> Id. at 106, quoting The Nature Conservancy, Conservation Easements (1992).

<sup>4</sup> Id. quoting Janet Diehl and Thomas S. Barrett, The Conservation Easement Handbook at T. (hereinafter the Conservation Easement Handbook).

<sup>5</sup> Id.

<sup>6</sup> Southern New England Forest Consortium, Inc. "Your Family Lands: Legacy or Memory," SNEFCI, Chepachet, R.I., 1991, at 2 (hereinafter "Your Family Lands,").

<sup>7</sup> "Conservation Easements: A Primer" supra note 1.

<sup>8</sup> Id. at 17.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> "Your Family Lands," supra note 6 at 3.

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<sup>13</sup> Id. at 4.

<sup>14</sup> Common Ground, TM Conservation News from the Conservation Fund. Vol 8, No. 6 Sept/Oct 1997.

<sup>15</sup> Paul C. Judge, "A Tax Break The Deer Will Love," Business Week, Jan. 29, 1998.

<sup>16</sup> "Land Protection Thru Tax Reform." Common Ground, Conservation News from the Conservation Fund, Vol. 8, No. 6 Sept/Oct, 1997.

<sup>17</sup> Your Family Lands, supra note 6 at 4-5.

<sup>18</sup> Id. at 5.

<sup>19</sup> Id.

<sup>20</sup> Id. at 8.

<sup>21</sup> Id. at 8.

<sup>22</sup> Conservation Easements: A Primer, supra note 1.

<sup>23</sup> The Conservation Easement Handbook, supra, note 4 at 108.

<sup>24</sup> The Connecticut law says: "Conservation restriction" means a limitation, whether or not stated in the form of a restriction easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use. CGs.47-42 a West, 1995) Acquisition of restrictions such conservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation in trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land. Such restrictions may be enforced by injunctions or proceedings in equity (47-42c.)

<sup>25</sup> Pennsylvania, Wyoming, Alabama and Oklahoma have not adopted the U.C.E.A.

<sup>26</sup> 481 N.E. 2d 491 (Mass 1985).

<sup>27</sup> Id. at 492.

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<sup>28</sup> Id. at 493.

<sup>29</sup> “Conservation Easements: A Viable Tool,” supra note 2 at 110-111.

<sup>30</sup> Id. at 111 fn. 179.

<sup>31</sup> Id. at 115 fn. 209, quoting The Conservation Easement Handbook at 92.

<sup>32</sup> Complaint, Town of Woodbury, Peter Hughes, Zoning Enforcement Officer v. Sajda  
Superior Court J.D. of Waterbury, June 23, 1998.

<sup>33</sup> CV-98-0146931-S. Verified Complaint First Count. #5-8 at 2.

<sup>34</sup> Id.

<sup>35</sup> Verified Pledging Filed Pursuant to Sect. 221-19 of Conn. Gen. Statutes CV -98-0146931-S, para 3.

<sup>36</sup> “Conservation Easements: A Viable Tool,” supra note 2 at 117.

<sup>37</sup> Id. at 119-120.

<sup>38</sup> Redford is not the only environmentally-conscious member of the entertainment industry. Singer James Taylor created an easement on 100 acres of farm lands and meadows he sold in 1998. T. Colleen Morgan, “James Taylor’s Cornwall, Connecticut Farm Gets New Owners Not New Use,” Litchfield County Times, Oct. 16, 1998 at 1 and 3.

<sup>39</sup> Note, “The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA.” 13 No. Ill. Univ. L. Rev. 37 at 389.